INDEX

	Page
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	9

CITATIONS

UNITED STATES CONSTITUTION:

Article 1, Section 2	2, 3
Article 1, Section 4	4, 5

UNITED STATES STATUTES:

2 U.S.C. 2a (c)	6

STATE STATUTES:

Section 3-10-19.1, N.M.S.A., 1953 Comp. (P.S.)	4
Section 3-3-20, N.M.S.A., 1953 Comp. (P.S.)	5
Section 3-14-20, N.M.S.A., 1953 Comp. (P.S.)	5

CASES:

Burns v. Richardson, 384 U.S. 73	8
Colegrove v. Green, 328 U.S. 549, 555	7
Fortson v. Dorsey, 379 U.S. 433	8
Wesberry v. Carr, 376 U.S. 1, 5	3, 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 385

MERRILL L. NORTON, *Petitioner,*

v.

JACK M. CAMPBELL, Governor of the State of New Mexico; BRUCE KING, Speaker of the House of Representatives of the State of New Mexico; W. C. WHEATLEY, President or presiding officer pro tempore of the Senate of the State of New Mexico; HAROLD RUNNELS, State Senator from Lea County, New Mexico; and FINIS HEIDEL, State Representative from District 1, Lea County, New Mexico,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE TENTH CIRCUIT

Respondents herein pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit from a judgment entered in the above-entitled cause on May 6, 1966 be denied.

QUESTIONS PRESENTED

1. Does Article I, Section 2, of the Constitution of the United States require a State, which is entitled to more than one Representative in Congress, to elect those Representatives from Congressional Districts?

2. Whether, where a State entitled to more than one representative has failed to divide the State into Congressional Districts, a United States Court is required, in view of Article I, Section 2 of the Constitution of the United States, to grant relief looking to the effectuation of such a division.

STATEMENT

Respondents do not wish to supplement the Statement of the Case presented by Petitioner, but do wish to make several corrections therein, for the sake of accuracy. As Respondents understand Rule 40 (I), of the Rules of the Supreme Court, the statement of the case should not be used for purposes of argument but only for purposes of presenting facts necessary to a determination.

As may be noted, Respondents restated the questions presented by the Petitioner in order to delete certain matters which are immaterial and irrelevant to the question Petitioner seeks to present to the Court. In order that the Statement of Facts not be cluttered Respondent would suggest that alleged facts concerning the residences of various members of the New Mexico Congressional delegation (Petition for Writ of Certiorari, page 3) and economic and social facts about New Mexico (Petition for Writ of Certiorari, page 6) are unnecessary to a determination of the questions presented.

Respondents also wish to make it clear that the quotation purportedly stating the doctrine of *Wesberry* v. *Carr*, 376 U.S. 1 (Petition for Writ of Certiorari, page 5) is Petitioner's interpretation of the doctrine announced in that case. It is Respondents' contention that *Wesberry* v. *Carr, supra,* does not support the statement of Petitioner.

REASONS FOR DENYING THE WRIT

Respondents respectfully submit that a brief analysis of the questions raised herein, in the light of the pertinent law, will make the answers so clear as to make further argument and briefs on the points unnecessary and will illustrate the correctness of the decision of the Court below.

First. It should be made clear that the issues presented by the Petition, and throughout the course of the proceedings below, did not and do not involve the merits of districting over at-large elections. The fact that one method better stands the tests of reason and may more closely conform to certain standards of fairness is immaterial. As the issue involved here does not concern the merits of districting, Petitioner's third point (Petition for Writ of Certiorari, pages 9 and 10) is immaterial to this cause. The issue presented is whether the Constitution requires districting.

Second. Article I, Section 2, of the Constitution of the United States, in pertinent part, is as follows:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

It does not mention "districts" or "districting", let alone requiring the same. It does, as the Court found, include a requirement of "one man equals one vote". *Wesberry* v. *Carr*, 376 U.S. 1. It is Respondents' contention that when the above section is read in conjunction with Article I, Section 4, of the Constitution of the United States, it is apparent that such a directive with regard to districting was not contemplated. Article I, Section 4 is as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

It appears from the above language that it was and is contemplated that "Times, Places and Manner of holding Elections" is initially a matter left to the States, with a proviso added that when they act, they act in a manner consistent with the directives contained in other sections of the Constitution. It is further provided that Congress may enact legislation which would supersede that of the States. It seems apparent that matters such as districting would be included among those problems which were delegated specifically to the States and Congress. As that problem was delegated the Constitution is silent with regard to it. No further comment was necessary.

Third. While New Mexico has no specific legislation directing that elections for Congressional Representatives on an at-large basis, there are State laws which of necessity require that procedure. Section 3-10-19.1, N.M.S.A., 1953 Compilation (P.S.) provides:

"In any primary, general or special election for United States representative, there shall be designated by the officer issuing the election proclamation as many places, consecutively numbered, as there are United States representatives to be elected and only one United States representative shall be elected for each place designated. Each candidate upon filing his petition, or any convention called for nominating candidates, shall designate the position number for which he is a candidate and he shall be so designated on the ballot."

Section 3-3-20, N.M.S.A., 1953 Compilation (P.S.) in pertinent part provides:

"FOR REPRESENTATIVE IN CONGRESS

Position 1 — received (word and figures) — votes
———————received (word and figures) — votes
———————received (word and figures) — votes
Position 2 — received (word and figures) — votes
———————received (word and figures) — votes
———————received (word and figures) — votes."

Section 3-14-20, N.M.S.A., 1953 Compilation (P.S.) in pertinent part provides on absentee ballots as follows:

"REPRESENTATIVES AT LARGE IN CONGRESS

Write in the names of your choice for representatives at large

Vote for two

_____

_____

_____

_____."

Certainly these sections which were enacted by the State Legislature, as contemplated by Article 1, Section

4, of the Constitution, *supra,* require that elections in New Mexico, be held on an at-large basis. In order to prevail in this action Petition must, of necessity, attack the constitutionality of such legislation. However, as the Court below pointed out, Petitioner "pretends" not to attack these enactments because he states that they do not control.

Fourth. Congress has enacted legislation which clearly indicates at-large elections are permissible. 2 U.S.C. 2a (c) provides:

> "(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) *if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;* (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased num-

ber of Representatives, they shall be elected from the State at large." (Emphasis added).

That portion emphasized above certainly does not indicate a prohibition of at-large elections. While it deals with redistricting, it is applicable to this fact situation.

Fifth. In this instance historical analysis such as that used by the Court in *Wesberry* v. *Carr,* 376 U.S. 1, does not assist Petitioner's cause. Undoubtedly, districting was discussed by persons drafting the Constitution. This fact is not disputed. The question is whether or not those drafting that document intended by the use of the language "shall be . . . chosen . . . by the people" to require elections by districting.

As discussed in the first point, above, matters such as districting were delegated to the States and Congress. The most reasonable reading of the Constitution leads to this conclusion. To construe the language, as Petitioner seeks to interpret it, is not in accord with the clear and simple language used. Had such an intent and effect been desired, it would have been easy to to draft language so stating. It was not done. It was not intended. Historical analysis, rather than indicating that the Constitution required districting, indicates only that districting would be desirable. No language in the Constitution *requires* districting.

Petitioner attempts to cite actual experience under the Constitution in support of his cause. (Petition for Writ of Certiorari, page 12). If anything, that history indicates, as Respondents contend, that the matter of districting is properly one for the States and Congress. As pointed out by Justice Frankfurter in *Colegrove* v. *Green,* 328 U.S. 549 at pp. 555-556, until

1842 there was a great diversity of methods used to elect representatives. Only when Congress acted at that time, were elections from districts required. Certainly the fact that elections from districts were require by Congressional enactments in 1842, cannot be used to support Petitioner's contention with regard to what the Constitution requires. Such *ex post facto* reasoning, while clear, is nevertheless patently invalid.

Sixth. Petitioner asserts in his Petition (Petition for Writ of Certiorari, p. 8) that the situation placed before the Court here is similar to that presented in *Fortson* v. *Dorsey,* 379 U.S. 433 and *Burns* v. *Richardson,* 384 U.S. 73. *Fortson* v. *Dorsey, supra,* involved the issue of whether multi-district counties violated the residents of such districts the right to equal voting power. This Court held that such an arrangement was valid. Essentially, the same arrangement is attacked by Petitioner herein, only on a Congressional rather than State level. The case does support Petitioner's contention. *Burns* v. *Richardson, supra,* too raised the issue as to the validity of multi-member legislative districts. Again the decision of this Court was that such a plan was valid. Although it was stated that such districts might possibly effect an invidious discrimination such could be proven only by *clear evidence* of record. Applying that test to the instant record, it is apparent that there is no clear evidence to support Petitioner's contentions. The only *purported* evidence alleged in Petitioner's statement that the Southern portion of the State has been neglected. *No evidence* was introduced in support of that statement. *Burns* v. *Richardson, supra,* does not aid Petitioner.

Seventh. Respondents submit that in view of the answer to the first question, no consideration of the second question is necessary.

CONCLUSION

Petitioner's questions have been presented. Respondents contend that the answers to those questions are clear and that the decision of the Court below is proper in all respects. Therefore, Respondents respectfully submit that any further consideration of the issues is unnecessary and that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

BOSTON E. WITT
Attorney General

MYLES E. FLINT
Assistant Attorney General

Attorneys for Respondents.